Supreme Court, U.S.
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NO. 90-1210

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHESTER UPLAND SCHOOL DISTRICT,

Petitioner,

v.

LESTER H., a Minor, and OCTAVIA P., his mother and next friend,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JANET F. STOTLAND
Attorney for Respondents

Education Law Center - PA
Suite 610
801 Arch Street
Philadelphia, PA 19107
(215) 238-6970

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The Eleventh Amendment to the U.S. Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below was correct in holding that a Pennsylvania school district is not a state entity entitled to claim Eleventh Amendment immunity.

2. Whether the Court below was correct in holding that compensatory education beyond age 21 is a form of relief available under the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400, *et seq.*, when a handicapped youngster has been denied appropriate education services for two and one-half years.

3. Whether the Court below was correct in concluding that a legal controversy was presented and that plaintiff's claims were justiciable.

COUNTER STATEMENT OF THE CASE

Respondent Lester H. (hereinafter Lester) is now 13 and is a resident of Petitioner Chester Upland School District (the District). Lester is severely disabled by retardation and behavioral problems. From the inception of this case the District has conceded, and the District Court ultimately held, that for a period of 30 months Lester did not receive appropriate special education services from the District. [Dist. Ct., Appendix at 29a].[1]

The Court also held that the District took an unreasonably long time to locate the residential special education program that the District and Lester's mother agreed that he needed. [Dist. Ct., Appendix at 34a]. During School Year 1984-85, while Lester was regressing in an inappropriate program, the District's agent applied to

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[1]The opinion of the District Court is included in the Appendix at 22a-45a, and the Opinion of the Court of Appeals at 3a-21a. The District Court's decision is designated "Dist. Ct." and the Appeals Court's decision as "App. Ct."

only two possible school placements. [Dist. Ct., Appendix at 25a].

In August, 1985, Lester was disenrolled from his day placement. From that date until his placement at the AuClair School in January, 1987, with the exception of a 34 day period in mid-1986, Lester received only 5 hours per week of in home instruction, a program that all parties agreed was inappropriate for him. Yet, from December 1984 until April, 1986, a period of 16 months, the District did not refer Lester to any potential in- or out-or-state placements. [Dist. Ct., Appendix at 25a-26a].

In November, 1986, Lester and his mother filed suit against the District and the Pennsylvania Department of Education. Plaintiffs alleged that the District and the Department had been denying Lester appropriate special education services since September, 1984, in violation of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. Plaintiffs sought pre-

liminary injunctive relief, namely, a residential education program for Lester. Plaintiffs also sought final declaratory relief requiring defendants to extend Lester's entitlement to special education services for two and one-half years beyond age 21 to compensate him for the two and one-half years of services he had already lost.

Lester's January, 1987 placement at AuClair mooted his request for preliminary injunctive relief, and the subsequent trial focused exclusively on the family's request for compensatory education services. On November 9, 1989, the District Court rendered a decision in favor of Plaintiffs, and ordered the Defendants to provide Lester with two and one-half years of compensatory services. [Dist. Ct., Appendix at 46a].

The District Court found that Lester had been harmed by the denial of appropriate education services:

> [T]he delay in placing [Lester] harmed his development. Lester H., like other seriously disabled youngsters, learns very slowly and by rote. He cannot generalize skills and must learn each skill and how to apply it. Lester H. also must "unlearn" nega-

> tive behaviors that have been acquired and/or reinforced, and this is also a slow process. Because Lester H. learns by frequent repetition of the same task or skill, the amount of time Lester H. spends in an appropriate eduction program is clearly related to how much Lester H. will learn. This 2-1/2 year loss of appropriate educational programming has reduced the amount that Lester H. can learn by the time he is 21. [Dist. Ct., Appendix at 28a].

The District Court also found, *inter alia*, that the School District was not entitled to Eleventh Amendment protection and that plaintiffs' claims presented a justiciable controversy. The District appealed, and the U.S. Court of Appeals for the Third Circuit affirmed in all respects.

Respondents respectfully assert that the decisions of the Courts below are consistent with the decisions of this Court and other Circuit Courts, and present no issue of sufficient importance to warrant review by this Court.

SUMMARY OF ARGUMENT

The Court of Appeals' holding that a Pennsylvania school district is not a state for Eleventh Amendment purposes is consistent with this Court's decision in *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977) and with the decisions of other Circuit Courts that have applied the *Mt. Healthy* decision to the laws of their states. Moreover, on October 30, 1990, Congress prospectively abrogated states' immunity in suits that arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1403. Thus a ruling by this Court on this issue will affect few, if any, cases, and will have no future applicability.

Similarly, the Court of Appeals' award of post-21 compensatory education is consistent with applicable Supreme Court precedent and the decisions of other Circuit Courts. Like the tuition reimbursement found to be "appropriate relief," 20 U.S.C. Section 1415(e)(2), in *School*

Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985), compensatory education, including post-21 compensatory services, are necessary to assure a free appropriate public education to all students with disabilities, including those whose parents are unable to "front" the cost of private school.

Even though 20 U.S.C. Section 1412(2)(B) gives students with disabilities the right to an education only until age 21, post-21 relief is consistent with Supreme Court precedent that recognizes that remedy for a violation of a right can exceed the scope of the original right. Such relief has been awarded by other Circuit Courts, and the few cases cited by Petitioner are distinguishable.

Finally, Respondents' claim for compensatory services was a legal controversy even though their claims for injunctive relief were moot. Moreover, those claims were ripe for adjudication. The injury to Lester was complete as of the date of trial, and relevant facts were known to all parties. The services needed by Lester at age 21 will be

determined at that time pursuant to the process set out in the IDEA, 20 U.S.C. Sections 1400, *et seq.*

ARGUMENT

A. CONGRESS HAS NOW ABROGATED ELEVENTH AMENDMENT IMMUNITY IN CASES ARISING UNDER THE IDEA; MOREOVER, THE COURT OF APPEALS' HOLDING THAT THE DISTRICT IS NOT A STATE FOR ELEVENTH AMENDMENT PURPOSES IS CONSISTENT WITH THIS COURT'S DECISIONS AND WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

This litigation arises under the Individuals with Disabilities Education Act (IDEA or the Act),[2] a law that requires participating state and local eduction agencies to provide free and appropriate special education services to students with disabilities. 20 U.S.C. Sections 1401(18), 1412(2)(B), 1414(a)(1)(C)(ii). In *Dellmuth v. Muth*, ___

[2]The Act was renamed in October 1990, P.L. 101-476, Section 103, October 30, 1990, 1094 Stat. 1106. It was formerly entitled the Education of the Handicapped Act (EHA).

U.S.___, 109 S.Ct. 2397 (1989), this Court held that the Act did not abrogate states' Eleventh Amendment immunity. On October 30, 1990, Congress prospectively overruled the *Dellmuth* decision by amending the Act as follows:

> Abrogation of State sovereign immunity
>
> (a) A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this Act.
>
> (b) In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public entity other than a State.
>
> * * *
>
> 20 U.S.C. Section 1403.

This case arose during the interstice between the decision in *Dellmuth* and Congress' passage of Section 1403. Thus, this Court's resolution of the question presented in this case -- whether a Pennsylvania school district is a state for Eleventh Amendment purposes in a case arising under IDEA -- will affect few, if any, other cases and will have no future application.

Moreover, the Court of Appeals' decision in this case is fully consistent with applicable Supreme Court precedent and with the decisions of other Circuit Courts. In *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977), this Court set out the test for determining whether a school district is to be treated as a state and entitled to Eleventh Amendment protection, or whether it is a local governmental unit to which the Eleventh Amendment does not extend. The test is fact and state specific, *Id.* at 280. Applying that test to the Ohio school district before it, the Court concluded that the district was "more like a county or a city than it [was] like an arm of the state," and thus that it was not entitled to Eleventh Amendment protection. *Id.* at 280.

The Court of Appeals analyzed Pennsylvania law as the *Mt. Healthy* decision directs.[3] It found that Pennsylvania districts, like Ohio districts, are incorporated entities

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[3]This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen v. Mass.*, 487 U.S. 879, 907-908 (1988).

with statutory rights to sue and be sued, to issue bonds and to collect taxes. In short, it concluded:

> When we examine the "nature of the entity created by state law," and balance the facts supplied by the record, we conclude that the status of school districts under Pennsylvania law is the same as the status of the Ohio school board in *Mt. Healthy*. [App. Ct., Appendix at 14a. Citations omitted.]

The Court of Appeals also rejected the argument that Pennsylvania's oversight of special education services, including its significant funding of special education, warrants a different result in this case. The Court concluded that in Pennsylvania:

> [T]he School District even in special education remains primarily responsible for providing, administering and maintaining special education services. Like the Court in Mt. Healthy, we conclude that a "significant amount of" state funding does not outweigh the established independent nature of a Pennsylvania school district. [App. Ct., Appendix at 15a. Citations omitted.]

These conclusions are consistent with the decisions of many other Courts of Appeals that have applied the *Mt. Healthy* analysis to their states' law. See *Minton v. St.*

Bernard Parish School Board, 803 F.2d 129, 131-32 (5th Cir. 1986) (inherent local character of Louisiana school boards considered critical); *Fay v. South Colonie Central School District*, 802 F.2d 21, 27-28 (2nd Cir. 1986) (state funding and role as "receptacle" of state education policy do not make school districts alter egos of the state); *Gary A. v. New Trier High School District No. 203*, 796 F.2d 940, 944-946 (7th Cir. 1986) (*per curiam*) (in suit for tuition reimbursement under the EHA, local school district defendants not entitled to Eleventh Amendment immunity or limited purpose immunity); *Travelers Indem. Co. v. School Board of Dade County*, 666 F.2d 505, 509 (11th Cir.), *cert. denied*, 459 U.S. 834 (1982) (state provision of funds for school construction project did not cloak county school board with Eleventh Amendment immunity; damages must come unconditionally out of state treasury). But *cf. Martinez v. Board of Education of Taos Municipal School District*, 748 F.2d 1393 (10th Cir. 1984) (state of New Mexico retains sweeping control over public education).

The Court of Appeals' decision on this issue is consistent with the applicable decision of this Court and with the decisions of other appellate courts. Moreover, Congressional abrogation of the Eleventh Amendment in IDEA cases has limited the potential impact of a decision of this Court on this issue. Thus, review by this Court is not warranted.[4]

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[4]The District Court articulated several other bases for rejecting the District's claim to Eleventh Amendment immunity that the Appellate Court did not find it necessary to reach: that compensatory relief in this case was a prospective injunction not barred by the Eleventh Amendment and that plaintiffs had pled Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, as an alternative basis for relief. Congress has abrogated Eleventh Amendment immunity for violations of Section 504 that occurred in whole or in part after October 21, 1986. 42 U.S.C. Section 2000d-7.

B. THE COURT OF APPEALS' DECISION THAT LESTER IS ENTITLED TO POST-21 COMPENSATORY EDUCATION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER FEDERAL APPEALS COURTS; MOREOVER, A DECISION OF THIS COURT WILL HAVE LIMITED APPLICATION BECAUSE OF THE UNIQUE FACTS OF THIS CASE.

The lower Courts found that the only way to remedy -- at least in part -- the harm that Respondent Lester H. has suffered was to award him compensatory education extending his entitlement to special education services for 30 months beyond age 21.[5] That compensatory education is a form of "appropriate relief" that can be awarded for violations of the IDEA is clear.

In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), this Court liberally construed the Congressional mandate to courts to grant "appropriate relief" for violations of the Act. 20 U.S.C. Section 1415(e)(2). *Burlington* held that these words

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[5]This is equivalent to the 30 months that Lester was denied appropriate services.

confer "broad discretion" on courts to insure that students with disabilities receive the free appropriate education guaranteed them by the Act. In that case, "appropriate relief" was an award of tuition reimbursement to a family that had been forced unilaterally to place their child in a private school to secure needed services.

Since the *Burlington* decision, every Court that has confronted the question has held that compensatory education can also be "appropriate relief," including, in some cases, post-21 compensatory education. As the seminal decision of the Eighth Circuit noted:

> Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory education services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along." 105 S.Ct. at 2003. Here, as in *Burlington*, recovery is necessary to secure the child's right to a *free* appropriate public education. *Id.* We are confident that Congress did not intend the child's entitled to a free education to turn upon her parent's ability to "front" its costs. (emphasis in original)

Miener v. State of Missouri, 800 F.2d 749, 753 (5th Cir. 1986). See, *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir.

1988), *vacated and remanded on other grounds sub nom Sobol v. Burr*, ___ U.S. ___, 109 S.Ct. 3209 (1989), *reaffirmed*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1298 (1990) (award of post-21 compensatory education); *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-858 (11th Cir. 1988) (award of post-21 compensatory education); *Jackson v. Franklin County School Board*, 806 F.2d 623, 631-32 (5th Cir. 1986) (remanded for determination as to whether damages or compensatory education most appropriate form of relief). Respondents respectfully assert that the *Burlington* decision compels the conclusion reached by these courts and by the Court below that compensatory education is a form of relief that can be awarded under the Act.

The District argues that post-21 compensatory education is inconsistent with the language of the IDEA that guarantees education services to students with disabilities until age 21. 20 U.S.C. Section 1412(2)(B). On

the contrary, the IDEA gives disabled youngsters the *right* to special education services to age 21; it does not require that *remedies* for violations of this right be so limited.

This Court has recognized in other contexts that the scope of the remedy can extend beyond the scope of the original right. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Bell v. Hood*, 327 U.S. 678, 684 (1946). The Court of Appeals for the Third Circuit and other Circuit Courts followed these precedents in awarding post-21 compensatory education. See, *e.g.*, *Burr, supra*, at 1078; see also, *Jefferson County Board of Education, supra*.

The Court of Appeals also recognized that a conclusion that Section 1412(2)(B) precludes post-21 relief produces a highly inequitable and irrational result.

> [S]chool districts would be immune from suit if they simply stopped educating intended beneficiaries of the [IDEA] at age 18 or 19. Those beneficiaries' cases would take at least two years to be reviewed, and even if the reviewing courts found the school

> districts' behavior egregious, the courts would be powerless to aid the intended beneficiaries because those beneficiaries would now be over 21. [App. Ct., Appendix at 17a-18a].

See also, *Burr, supra*, at 1078. ("If, in this case, we do not allow an award of [post-21] compensatory education, then Clifford's right to an education between the ages of 3 and 21 is illusory.")

The Petitioner contends that this Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988), is in conflict with the Court of Appeal's construction of 20 U.S.C. Section 1412(2)(B). This argument is clearly erroneous and was dismissed by both lower courts.

The plaintiffs in *Honig* were two youngsters with emotional disabilities who had been expelled from school despite the IDEA's mandate that the educational placement of children with disabilities cannot be unilaterally changed. 20 U.S.C. Section 1415(e)(3). The students sought *only* injunctive relief, and obtained it promptly. By the time the case reached this Court, one of the students was over 21, and the Court found that his claim for

injunctive relief -- that is, protection from future illegal school exclusions -- was moot. The distinction between *Honig* and the instant case was clearly stated by the lower Court:

> The crucial difference between *Honig* and Lester's case is the nature of the relief. In *Honig*, Doe was only asking that the Court make the District comply with the Act in the future. But, as an adult (*i.e.*, someone over age 21), Doe had no right to demand that the District comply with the Act either presently or in the future. The Act only gives minors the right to education. Lester, in contrast, is only requesting a remedy to compensate him for rights the district already denied him. He has the right to ask for compensation because the School District violated his statutory rights while he was still entitled to them. [App. Ct., Appendix at 17a].

Finally, Petitioner argues that two state court decisions, *Adams Central School District No. 090 v. Deist*, 214 Neb. 307, 334 N.W.2d 775, *opinion modified on other grounds*, 338 N.W.2d 591 (1983), and *Natrona County School District No. 1 v. McKnight*, 764 P.2d 1039 (1988), are also in conflict with the decision of the Appeals Court. *Adams, supra*, does hold that post-21 compensatory relief is not obtainable under the Act. However, that case was

decided prior to this Court's decision in *Burlington*, and thus the Nebraska Supreme Court did not have the advantage of this Court's detailed and broad construction of the Congressional mandate that courts award "appropriate relief."

The *Natrona* case is also distinguishable. It pivots on the Wyoming Supreme Court's interpretation of state law as absolutely prohibiting Wyoming education agencies from providing an education to any student beyond age 21, at least in the absence of egregious bad faith. The Court emphasized the state specific nature of its decision in distinguishing it from the decision of other Courts that had granted post-21 relief:

> The variant results achieved with diversified factual situations...does [sic] not alter our application of controlling principles for Wyoming law. 764 P.2d at 1052.[6]

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[6]The only federal court decision that could be read as inconsistent with the conclusion that courts can award post-21 compensatory education is also distinguishable. In *Alexopulos v. Riles*, 784 F.2d 1408, 1412-13 (9th Cir. 1986), the plaintiff characterized his complaint as one for equitable relief. Thus, unlike Lester, he was not just asking for compensation. [App. Ct., Appendix at 19a].

Finally, the unique factual situation in this case limits the potential impact of a decision by this Court. It was uncontested by the parties that Lester was virtually denied essential services for a two and one-half year period. During that time, he was either placed in a school that did not meet his needs - and where he deteriorated - or in a five hour per week program in his home. [App. Ct., Appendix at 5a-6a, 20a; Dist. Ct., Appendix at 24a- 26a, 42a]. During this time, the District made only sporadic efforts to locate an appropriate program for Lester. [App. Ct., Appendix at 6a, 20a; Dist. Ct., Appendix at 24a-27a]. Situations as egregious as the instant one are rare. Thus, a decision of this Court in this unique case is unlikely to be broadly applicable, militating further against review by this Court.

The Court of Appeals' award of post-21 compensatory relief to Lester is consistent with this Court's decision in *Honig v. Doe* and with the decisions of other federal courts. The state Court decisions cited by the

Petitioner are distinguishable, and a decision of this Court on this issue will not affect large numbers of students or school districts. Thus, Supreme Court review is not warranted.

C. NEITHER OF PETITIONER'S REMAINING ARGUMENTS, THAT THERE WAS NO CONTROVERSY PRESENTED AND THAT THE CASE WAS NOT RIPE FOR ADJUDICATION, IS CORRECT OR WARRANTS SUPREME COURT REVIEW.

Petitioner does not suggest that the lower Courts' holdings that a controversy existed and that the case was ripe for adjudication are in conflict with the decision of another circuit court or of the highest court of any state -- or that those holdings in any other respect meet the criteria for Supreme Court review. Moreover, the lower Courts correctly decided these issues below.

It is undisputed that by the time trial in this case was held, plaintiffs' request for injunctive relief -- placement of Lester in an appropriate education program -- was moot. Nevertheless, there was still "a clear controversy over

[Lester's] entitlement to compensatory relief for that period when he admittedly had no appropriate educational placement." [Dist. Ct., Appendix at 45a].

"Ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 200 (1983) [quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)]. Petitioner argues that the case was not "ripe" for adjudication because Lester's educational needs as of age 21 could not yet be precisely ascertained. As the lower Court stated, by the time of trial, Lester's injury was clear, and all of the actions that had led up to that injury were known to the parties and were clear in the witnesses' minds. Were the plaintiffs to have been forced to wait until Lester was 21 to bring their claim -- another 13 years -- the pertinent facts would have been virtually impossible to prove.

Moreover, although the exact contours of the remedy -- what Lester will need educationally when he is age 21 -- were not then ascertainable, the lower Court's remedy was not speculative. The District Court did not require Petitioner to provide Lester specific services at age 21. It simply extended Lester's entitlement to services for 30 months, leaving it to the detailed process of individualized program development set out in the IDEA to delineate the contents of that program at the appropriate time. See, *e.g.*, 20 U.S.C. Sections 1401(20), 1412(4),(5); 34 C.F.R. Sections 300.340-300.346, 300.500-300.512, 300.530-300.534 (1990).

Petitioner's argument that Respondents' claims did not constitue a legal controversy and were not ripe for adjudication meets none of the criteria for Supreme Court review and was correctly disposed of by the Court below.

CONCLUSION

For all the above reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JANET F. STOTLAND
Attorney for Respondents
Counsel of Record

February, 1991